

OFFICE OF THE GOVERNOR
STATE OF MONTANA

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GOVERNOR



MIKE COONEY
LT. GOVERNOR

November 18, 2019

U.S. Department of State
2201 C Street NW
Washington, DC 20520

RE: Keystone XL Pipeline DSEIS, docket number DOS-2019-0033

To whom it may concern:

I am writing to submit comments on behalf of the State of Montana on the Draft Supplemental Environmental Impact Statement (Draft SEIS) for the Proposed Keystone XL Pipeline. Dating back to my time serving as Montana's Attorney General and throughout my two terms as Governor I have consistently expressed my view that development of Keystone XL must take into account the safety and security of the pipeline, the workers who will construct it, and the communities it will pass through. Twice I have written the Army Corps of Engineers expressing concern over the lack of adequate tribal consultation and the lack of analysis of potential impacts to water supplies associated with stream and river crossings and cultural resources in the State of Montana. In May of this year I also wrote to Chair Neumayr of the White House Council on Environmental Quality asking for closer coordination with the state, a timeline for outstanding federal permitting and environmental review decisions for the project, plans to address known deficiencies with water supply impacts and provisions of the National Historic Preservation Act, the need to address the impact of greenhouse gas emissions and climate change, and federal agency plans to re-initiate and complete tribal consultation requirements.

You can imagine my frustration upon learning of the finalization of this Draft SEIS through outreach from TC Energy just days ahead of the federal agencies publishing their findings in the Federal Register. Since publishing the Draft SEIS, the federal permitting agencies have held only a single open house in Billings, MT for the public, offering them neither an opportunity to comment nor a formal presentation. Moreover, the federal agencies have relegated our state agencies and our tribal nations—each of whom have an important role in the permitting and construction of a project of this magnitude—to mere stakeholders in the federal agencies' process for outreach and environmental review. This level of coordination is wholly inadequate and reflects a dereliction of the core responsibilities required by law to co-sovereigns. It also undermines the State Department's efforts to fulfill its responsibilities under the National Environmental Policy Act (NEPA) and National Historic Preservation Act in a timely and adequate manner.

NEPA requires federal agencies take a "hard look" at their proposals in light of available information, analysis, and the potential for environmental impacts. In our review, the state concludes that the Draft SEIS falls short of this requirement and remains deficient in several important ways. The following comments reflect the consolidated views of the Montana Departments of Environmental Quality, Fish, Wildlife and Parks (FWP) and Department of Natural Resources and Conservation (DNRC).

Potential Spill Impacts and Response:

First and foremost, we are deeply troubled by the failure of the Draft SEIS to adequately analyze potential impacts from a spill to water supplies based on the past experiences of spills in 2011 and 2015 on the Yellowstone River in Montana from smaller-diameter pipelines than the Proposed Project. By arbitrarily setting a 40-mile maximum spill distance and failing to analyze winter ice conditions, Montana is concerned that the State Department has under-reported the potential spill impacts in the Draft SEIS. It is concerning that the two Federal agencies involved in this analysis acknowledge two separate oil spills in Montana that have traveled further than the Draft SEIS analysis area of 40 river-miles, particularly due to the observations of oil impacts to land and vegetation 72 miles downstream from the Laurel spill. We note on the Missouri River that the water intake for the Assiniboine & Sioux Rural Water Supply System and the Dry Prairie Rural Water System lies approximately 57 miles from the proposed river crossing. How can the analysis in the SEIS be limited to only 40 river-miles while the document itself cites two recent spills in Montana that have demonstrated that impacts can occur at a greater distance? Moreover, why was an analysis of potential for scour impacts associated with flooding and channel migration completed for the Missouri River and not the Yellowstone River where two prior spills occurred in flood conditions?

Montana finds no credible basis for the explanation that spill responses would typically limit the distance of impacts to 40 miles. Any analysis should be completed using all the possible spill response times specified in 49 CFR 194.115(b). We further note that the state has not been consulted regarding Spill Response Plans referenced in the Draft SEIS. The State of Montana requests the U.S. Department of State require TC Energy to provide local, county, state and tribal nation emergency response agencies an opportunity to review and offer comment to these Response Plans. With two pipelines breaching in the Yellowstone River over the past eight years, the state has, unfortunately, gained valuable experience in responding to pipeline spills and believes local, county, state and tribal nation emergency response agencies can help assist in making these Response Plans more valuable and useful if they were ever needed to be deployed.

Moreover, Chapter 5 of the Draft SEIS fails to analyze a spill scenario of an iced-over river condition. The only mention of this type of scenario is the reference to the facts regarding the Bridger pipeline spill in Montana in 2015. This oversight needs to be corrected in the Draft SEIS to analyze and disclose to the public the potential impacts from a spill into an iced-over river. Ice cover, commonly about 18-inches thick along the Missouri and Yellowstone Rivers in winter, not only affects flow regimes but also impacts the rate of volatilization of known chemical contaminants such as benzene. Montana further notes that modeling of potential transports of contaminants from oil spills using benzene, a highly toxic chemical compound for human health,

may understate transport distances in river systems of contaminants due to benzene being the least persistent in the environment and most volatile of the known contaminants of concern expected to occur in materials transported by Keystone XL. In contrast to other contaminants, benzene evaporates when river turbulence exposes the dispersed molecules to the air. This becomes an important factor to consider in different seasons, with higher temperatures in the summer increasing volatility, and with winter conditions lowering volatility and limiting exposure to air during ice over.

In several places, the Draft SEIS conducts analysis of the Pipeline and Hazardous Materials Safety Administration incident database and statistics to characterize risks. It omits any relevant background on causes, impacts and remedial actions related to recent spills involving the project proponent in North Dakota (2019) and South Dakota (2018). This data and analysis should be updated to reflect 2018 and 2019 incidents.

In order for the state to have an independent perspective on potential spill impacts to irrigation and drinking water supplies the Montana Department of Natural Resources and Conservation commissioned an engineering study that identifies the potentially impacted water infrastructure of Eastern Montana, evaluates factors that determine the resiliency of surface water intakes to contaminant spills, conducts preliminary modeling of spill scenarios and identifies possible alternative solutions to increase resiliency and mitigate potential impacts. The Water Supply Intake Resilience Analysis completed by Bartlett & West, Newfields and the DNRC is attached here and incorporated in full as part of the state's comments. It is also available online: <http://dnrc.mt.gov/divisions/carrdd/docs/publications/eastern-mt-water-supply-intake-resilienceanalysis10302019.pdf>. The state emphasizes that the study should be viewed as relevant information to the concerns raised regarding potential water supply impacts in these comments, but should also be considered as preliminary and not, in and of itself, satisfactory for meeting the requirements of finalizing a thorough environmental review. Caution should be used when interpreting the results of the study to avoid drawing conclusions out of context.

The analysis confirms that contemporary safety standards for the design, construction and operation of the pipeline have been met by the project and that proposed, shutoff valve locations, Horizontal Directional Drilling (HDD) to locate pipeline at depths of 50-70 feet below riverbeds, monitoring and other efforts serve to minimize the risks of potential spills. Nevertheless, modeling completed suggests that spills at relatively low volumes under the right conditions have remote potential to impact key surface drinking water supply systems serving the Fort Peck Assiniboine Sioux and Dry Prairie Water Systems as well as the city of Glendive and nearby irrigation users. The study explores several mitigation alternatives that can further reduce risks that should be considered in coordination with any final permitting decisions. These include siting alternate intakes upstream of the pipeline crossing, building reserve capacity with onsite raw water ponds, having temporary piping available for emergency deployment, and improving drinking water treatment and monitoring systems. The City of Glendive water intake improved their monitoring and treatment technology following the Bridger pipeline spill to include a MS1200 on-line oil in water analyzer and temporary granular activated carbon technology available for rapid deployment in the event of a spill. Due to the relatively low costs and effectiveness of this monitoring and treatment technology, the state believes similar technology

should be a minimum mitigation requirement of any authorizations finalized by the federal agencies in connection with the proposed project for water intakes on the Missouri River serving the Ft. Peck and Assiniboine Sioux Reservation and the Dry Prairie Rural Water System.

Cultural Resource Impacts:

The state wishes to acknowledge significant efforts to resurvey areas for cultural resources from milepost 0 to 77 during the summer of 2019 north of the Missouri River to address known deficiencies from prior efforts. This re-inventory resulted in the documentation of additional historic and precontact archaeological sites and locations of tribal nation importance within and proximal to the proposed project's right of way. The state believes the Draft SEIS should provide a rationale for the 2019 re-inspection of this specific section and should discuss whether the results of the re-inspection suggest that additional sections of the centerline and/or associated facilities also need re-inspection. Any final SEIS should confirm whether the cultural resource inventories conducted prior to 2014 on other sections are complete and valid.

There are a number of places where the Draft SEIS mischaracterizes impacts to cultural resources or incorrectly conflates NEPA terminology and practice with that of requirements arising from Section 106 of the National Historic Preservation Act. For instance, the No Action alternative in Section 4.9 ignores the testing and mitigations that have already begun across a vast number of cultural sites and historic properties along the project ROW. As such, there has already been an impact to the integrity of these sites, regardless if the No Action Alternative is selected. Sites were sometimes tested and mitigated without any participation or consultation with local tribes (i.e., 24VL938), making tribal interpretation impossible. Mitigations may be considered to have minimized impacts, but impacts have occurred, and it is inaccurate to state otherwise. Section 4 incorrectly characterizes indirect effects from construction activities. Under Section 106, anything that affects the integrity of a site is a direct impact. Just because an impact happens outside of the ROW or construction corridor does not make the impact secondary. If integrity of a site is impacted, it is a direct impact. It may be helpful to differentiate between "impacts" and "adverse effects." On pages 12 and 66, the State Department confuses concepts related to mitigation and treatment of cultural resource sites. Avoidance of impacts is referred to as 'treatment,' while resolution of unavoidable impacts is referred to as mitigation.

Fish and Wildlife Resources and Impacts:

Montana Fish, Wildlife and Parks (FWP) requests the federal agencies and TC Energy coordinate with state officials to reduce potential conflicts with federally endangered pallid sturgeon recovery actions. Pallid sturgeon (adult & juvenile) spawning migrations and overwintering distribution have been documented in the Yellowstone River upstream of Intake from 2014-2019 and natural passage via the side channel occurred in 2014, 2016 & 2017 in addition to translocation from 2017-2019 (see attached map). Planners need to be aware of a proposal to implement test flows from Fort Peck Dam to benefit pallid sturgeon. These test flows could be implemented as early as 2021 but more likely 2022. Additionally, FWP requests that mainstem boring for HDD activities not occur during pallid sturgeon spawning periods from April 15 to June 30 as known pallid sturgeon spawning areas overlap with the proposed bore

locations. FWP further requests TC energy consider boring under all creeks with documented fisheries in Montana, including but not limited to: Pennel, Sandstone and Little Beaver Creeks (Fallon County); and Boxelder Creek (Carter County).

FWP also requests that TC Energy consult with the Department on changes in transmission and distribution lines from previously-identified routes required to support the proposed project. FWP is able to provide updated GIS layers relative to wildlife distribution, winter range, migration corridors etc., as well as most recent species-specific occurrence data that the Natural Heritage Program manages within the Keystone XL project footprint to assist TC Energy and their partners in developing infrastructure in a manner that minimizes impacts to wildlife and habitat.

Additional Comments:

There are several places where the Draft EIS should rely upon contemporary data sets and policy when describing market conditions and trends. These include using the 2019 EIA International Outlook instead of 2017 and 2018, and acknowledging the recent Alberta curtailment policy/production cap that was instituted in 2019 and its effect on WCSB crude oil prices, including contemporary market impacts and those projected in the future.

The State of Montana appreciates the additional analysis regarding greenhouse gases and climate change. Impacts expressed in million metric tons of carbon dioxide equivalent per year may not be comprehensible to the public or decision makers. As required by 40 CFR Section 1502.1, an environmental impact statement is more than a disclosure document. An EIS must translate technical data into terms that render it an effective disclosure of the environmental impacts of a proposed project to all of its intended readership. Although no longer required by CEQ NEPA guidance, an effective way to translate the impacts of additional greenhouse gases would be by explaining the impacts in terms of the economic costs associated with those impacts.

The State of Montana would also like clarification on why the U.S. Department of State has led the preparation of this NEPA document given there is no longer any action before the Department with this Project. Montana's understanding of 40 CFR Section 1501.5 would dictate that one of the three federal agencies who has a permitting decision before them and mentioned on page S-1 should be leading the NEPA document and the other remaining federal agencies should be co-leads or cooperating agencies. We note that the structure of the Summary section under S.3 Federal Decisions does not list any remaining decision for the U.S. Department of State. There is no concise and consistent explanation to the public within the Draft SEIS of the reason the U.S. Department of State should be the lead federal agency.

Thank you for your consideration of the comments of the State of Montana. We hope the State Department and the cooperating federal agencies are able to complete a full analysis of the project impacts to inform the public and ensure potential risks are fully mitigated. If you have additional questions regarding these comments please contact Patrick Holmes, Patrick.holmes@mt.gov of my office and Craig Jones, crajones@mt.gov, from the Montana Department of Environmental Quality.

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Sincerely,

A handwritten signature in blue ink, appearing to read 'Steve Bullock', with a long horizontal flourish extending to the right.

STEVE BULLOCK
Governor

Attachments:

Water Supply Intake Resilience Analysis (October 2019), DNRC, Barlett & West, Newfields
Map – Pallid Sturgeon Observation